

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
SOUTHTOWNS DATSUN, INC.,	:	DETERMINATION
AND THOMAS FLYNN AND	:	
DANIEL FABRIZIO, OFFICERS	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Periods Ended August 31,	:	
1982 and August 31, 1983.	:	

Petitioners, Southtowns Datsun, Inc., and Thomas Flynn and Daniel Fabrizio, officers, 3580 Southwestern Boulevard, Orchard Park, New York 14127, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods ended August 31, 1982 and August 31, 1983 (File No. 803201).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 65 Court Street, Buffalo, New York, on June 28, 1988 at 9:15 A.M. Petitioners appeared by G. Daniel O'Connell, C.P.A. The Audit Division appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUE

Whether the Audit Division properly assessed compensating use tax on two boats purchased and subsequently resold by petitioner Southtowns Datsun, Inc.

FINDINGS OF FACT

1. On December 17, 1988, following an audit, the Audit Division issued notices of determination and demands for payment of sales and use taxes due to petitioners, Southtowns Datsun, Inc., and Thomas Flynn and Daniel Fabrizio, as officers. Each of the notices assessed \$1,610.00 in tax due for the quarter ended August 31, 1982 and \$4,144.37 in tax due for the quarter ended August 31, 1983, plus penalty and interest for each of the periods at issue.
2. The assessments herein result from Audit Division determinations that two boats purchased by Southtowns Datsun, Inc., together with costs of repairs and refurbishments to each boat, were properly subject to compensating use tax. The purchase price of each boat and the repair costs were taken from the books of Southtowns Datsun.
3. Petitioners Flynn and Fabrizio were president and secretary-treasurer, respectively, of Southtowns Datsun during the relevant period.
4. Petitioner Southtowns Datsun, Inc. is an automobile dealership. In June 1982, Mr. Flynn caused Southtowns to purchase its first boat, a 1965 Chris Craft 37-foot cabin cruiser.

This boat was in need of substantial repairs and refurbishments. It was put in the water in July 1982, but more repairs were necessary. Most important of these was the replacement of the boat's generator, which was installed in August 1982. Still more repairs were needed and the boat was taken out of the water in October 1982 for winter storage. Additional work was done on the boat over the winter.

5. Given the extensive repairs on the boat, little use was made of it during the summer of 1982. Mr. Flynn used the boat perhaps six times during 1982.

6. The boat was put back into the water in May 1983. It was subsequently taken back out of the water to be painted. Following painting, the boat was put back into the water in July 1983. At that time, the boat was considered by Mr. Flynn to be ready for sale. The boat was sold in August 1983. Southtowns collected and paid over sales tax on the sale of the boat.

7. In July 1983, Mr. Flynn caused Southtowns to purchase a second boat, a Chris Craft 48-foot flush deck cruiser. Compared to the first boat, this boat required little, if any, repair work, and was "up and ready" for sale soon after purchase. This boat was sold by Southtowns in October 1983.

8. Mr. Flynn used the boats frequently during the 1983 season. He took the first boat out about once a week and the second boat out about twice a week. He generally took four-hour cruises on the boats. For the most part, Mr. Flynn used the boats to show prospective buyers or acquaintances of prospective buyers how the boats operated and to demonstrate the "fun" of owning a boat. On these cruises, Mr. Flynn was attempting to create a market for the boats, which were larger than most pleasure craft in the Buffalo area.

9. Mr. Flynn conceded that, in addition to the usage described above, he also made some purely personal use of the boats. He estimated that 20 to 30 percent of his use of the first boat was personal, while his personal use of the second boat was somewhat less.

10. Following their purchase, each of the boats was placed in one of Southtowns' fixed asset accounts entitled "Airplane Account".

11. At the time of purchase of each of the boats, Mr. Flynn intended to resell each when it became "up and ready" for sale.

12. Southtowns registered as a boat dealer with the Department of Motor Vehicles on November 3, 1983. Southtowns purchased and sold boats, to a limited extent, subsequent to the purchases and sales discussed herein. Southtowns is no longer engaged in any buying and selling of boats.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes sales tax on the receipts from retail sales of tangible personal property, with exceptions not relevant herein. Sales for resale are excluded from the definition of retail sale in the statutory scheme (Tax Law § 1101[b][4][i][A]), and are therefore excluded from the tax imposed by Tax Law § 1105(a). If tangible personal property which was purchased for resale is subsequently put to a taxable use by the purchaser, compensating use tax is due on such use (Tax Law § 1110; 20 NYCRR 531.3[a][2]).

B. The personal use of the boats in question (Finding of Fact "9") was a taxable use of the boats pursuant to 20 NYCRR 531.3(a)(2). The Audit Division, therefore, properly determined that the boats in question were subject to tax.

C. The Audit Division's calculation of use tax herein was proper. At hearing, petitioners contended that, if the tax was properly assessed, it should have been computed by the method set forth in the Audit Division's Technical Services Bureau Memorandum (TSB-M-82[3.2]S)¹. Briefly, that method involves the application of the prevailing tax rate to a monthly depreciation rate of two percent of the boat's cost to the boat dealer.

Petitioners' contention is rejected. TSB-M-82(3.2)S, by its terms, applies to "the use of boats held in a boat dealer's inventory". Here, petitioner was not a boat dealer during the period at issue (Finding of Fact "12"), nor were the boats in question held in inventory (Finding of Fact "10"). Thus, the computational method set forth in TSB-M-82(3.2)S is unavailable to petitioner herein.

D. The petition of Southtowns Datsun, Inc., and Thomas Flynn and Daniel Fabrizio, officers, is in all respects denied, and the notices of determination and demands for payment of sales and use taxes due are sustained.

DATED: Albany, New York
November 17, 1988

/s/ Timothy J.
Alston _____
ADMINISTRATIVE LAW JUDGE

¹At hearing, petitioners apparently overlooked TSB-M-82(3.2)S and argued that the computational formula described in TSB-M-83(13)S should apply to the instant matter. The formulas in both TSB-M-82(3.2)S and TSB-M-83(13)S are identical; however, 83(13)S pertains to motor vehicle dealers, while 82(3.2)S applies to vessels sold by boat dealers. Thus, 82(3.2)S is discussed herein.